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COMPARATIVE DEFAMATION LAW:

ENGLAND AND THE UNITED STATES

Vincent R. Johnson

I. COMMON HISTORY, DIFFERENT PATHS

England and the United States share a common legal tradition that has been shaped by principles dating back at least 800 years to the time of the Magna Carta.[1] Even after the American colonies declared their independence from England in 1776,[2] English law was still widely followed in the new nation unless it was inconsistent with American institutions or new ideas.[3] As late as 1964, American libel[4]

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[1] *See generally* Vincent R. Johnson, *The Ancient Magna Carta and the Modern Rule of Law: 1215-2015*, 47 ST. MARY'S L.J. 1, 4 (2015) ("the Magna Carta catalyzed legal developments in England, the United States, and other countries that ultimately led to the robust contemporary support that the Rule of Law now enjoys"); *see also* Vincent R. Johnson, *The Great Charter*, 78 TEX. B.J. 266, 267 (Apr. 2015) ("[T]he provisions of the Magna Carta were to shape American jurisprudence, particularly the law of Texas.").

[2] *See* DAVID MCCULLOUGH, *1776*, 135 (2005) ("In Philadelphia, the same day as the British landing on Staten Island, July 2, 1776, the Continental Congress . . . voted to 'dissolve the connection' with Great Britain.").

[3] *See* Elizabeth Samson, *The Burden to Prove Libel: A Comparative Analysis of Traditional English and U.S. Defamation Laws and the Dawn of England's Modern Day*, 20 CARDOZO J. INT'L & COMP. L. 771, 771 (2012) ("[T]he first legislative acts taken by many of the newly independent states was to adopt the already established, predictable, and structured body of English common law by way of a 'reception statute'. . . ."); *see also* Van Ness v. Pacard, 27 U.S. 137, 144 (1829) (plurality opinion) (Justice Joseph

law was essentially "identical" to English libel law.[5] This was true, in part, because until the mid-twentieth century, defamation[6] law in both countries was defined "mainly by

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Story wrote: "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birth right. But they brought with them, and adopted only that portion which was applicable to their situation."); *see generally* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 97 (1973) (discussing the American reception of English law).

[4] *See* RESTATEMENT (SECOND) OF TORTS § 568(1) (AM. LAW INST. 1977) ("(1) Libel consists of the publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words. (2) Slander consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those stated in Subsection (1).").

[5] Kyu Ho Youm, *Liberalizing British Defamation Law: A Case of Importing the First Amendment?* 13 COMM. L. & POL'Y 415, 421 (2008).

[6] *See* RESTATEMENT, SECOND, OF TORTS § 559 (AM. LAW INST. 1977) (defining defamatory statements as those that tend "to harm the reputation of [the victim so] as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.").

the common law and decisions of the courts,"[7] rather than by statutes, American constitutional principles, or the United Kingdom's recognition of freedoms guaranteed by the European Convention on Human Rights (ECHR).[8]

However, during the past half century, the paths of England and the United States have significantly diverged in the field of defamation. So great are the differences that in recent decades United States courts have refused to enforce English judgments arising from claims for libel and slander.[9]

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[7] SIR BRIAN NEILL, RICHARD RAMPTON QC, HEATHER ROGERS QC, TIMOTHY ATKINSON, & AIDAN EARDLEY, DUNCAN AND NEILL ON DEFAMATION 1 (4th ed. 2015) (hereinafter "Neill").

[8] *See id.* at 11 (discussing the United Kingdom's enactment of the 1998 Human Rights Act which gave further recognition to the ECHR). In June 2016, voters in the United Kingdom opted to leave the European Union in a referendum commonly known as "Brexit." *See* Brian Wheeler and Alex Hunt, *Brexit: All you need to know about the UK leaving the EU*, BBC NEWS (Sept. 1, 2016) http://www.bbc.com/news/uk-politics-32810887.

[9] *See* Abdullah v. Sheridan Square Press, Inc., No. 93 CIV. 2515 (LLS), 1994 WL 419847, at *1 (S.D.N.Y. May 4, 1994) ("Since establishment of a claim under the British law of defamation would be antithetical to the First Amendment protections accorded the defendants . . . the second cause of action . . . is dismissed."); Bachchan v. India Abroad Pubs. Inc., 585 N.Y.S.2d 661, 665 (Sup. Ct. 1992) (holding that in light of the fact that, under English law, defamatory statements are presumed to be false, truth is an affirmative defense, and plaintiffs are not required to prove

In response to what is often called "libel tourism"[10] – the preference of defamation plaintiffs to sue media defendants in England[11] and other countries where they can avoid American constitutional protections for free speech

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fault on the part of the defendant, "[t]he protection to free speech and the press embodied in . . . [the first] amendment would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England. . . ."); *see also* Sarl Louis Feraud Int'l v. Viewfinder, Inc., 489 F.3d 474, 481 (2d Cir. 2007) (American courts follow a two-step process "in deciding whether foreign libel judgments are repugnant to public policy: (1) identifying the protections deemed constitutionally mandatory for the defamatory speech at issue, and (2) determining whether the foreign libel laws provide comparable protection.").

[10] *See* Lili Levi, *The Problem of Trans-National Libel*, 60 AM. J. COMP. L. 507, 553 n. 1 (2012) ("The phrase refers to a particular example of forum shopping: defamation plaintiffs choosing to sue in jurisdictions with relatively insignificant ties to the case but claimant-favorable substantive law.").

[11] Until recently, London was the "libel capital of the world" because it was the favored forum for American plaintiffs who wished to avoid the constitutional obstacles of prosecuting a defamation claim in their home country. Kyu Ho Youm, *Liberalizing British Defamation Law: A Case of Importing the First Amendment?*, 13 COMM. L. & POL'Y 415, 429 (2008).

and free press[12]—the United States in 2010 passed a law commonly referred to as the "SPEECH Act."[13] That law prohibits American courts from recognizing or enforcing foreign judgments for libel and slander obtained under laws that do not provide as much protection for speech and press as is afforded by the first amendment of the United States Constitution and by the laws of the state where enforcement is sought.[14] The only exception to this prohibition is if "the party opposing recognition or enforcement of that foreign judgment would have been found liable for defamation by a domestic court" under applicable United States laws.[15]

In light of the SPEECH Act, it is widely assumed that American courts will normally refuse to recognize or enforce

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[12] *See* Bruce D. Brown & Clarissa Pintado, *The Small Steps of the SPEECH Act*, 54 VA. J. INT'L L. DIG. 1, 2 (2014) ("Foreign libel plaintiffs . . . circumvent 'actual malice' rules . . . and other substantive First Amendment rights . . . [and] English courts were willing to assert personal jurisdiction over a defendant publisher who was not deliberately targeting a British audience.").

[13] SECURING THE PROTECTION OF OUR ENDURING AND ESTABLISHED CONSTITUTIONAL HERITAGE ACT, Pub. L. No. 111-223, 124 STAT. 2380 (2010) (codified at 28 U.S.C. §§ 4101-05). "This Act may be cited as the . . . 'SPEECH Act.'"; *Id.* § 1.

[14] 28 U.S.C. § 4102(a)(1)(A).

[15] 28 U.S.C. § 4102(a)(1)(B).

English libel and slander judgments against commercial publishers. This is so because United States tribunals have held that American federal and state law "reflects a public policy in favor of a much broader and more protective freedom of the press than ever provided for under English law."[16]

The American refusal to respect English defamation judgments is naturally a source of embarrassment to some English.[17] However, in the United Kingdom, section 9 of Defamation Act 2013[18] mitigates that problem by including provisions that limit the number of occasions when issues will arise related to recognition of English defamation judgments. Under the 2013 Act, "a court [in England or Wales] does not have jurisdiction to hear and determine an

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[16] Telnikoff v. Matusevitch, 702 A.2d 230, 240 (Md. 1997).

[17] Select Committee Announcement, *Press Standards, Privacy and Libel* (Feb. 24, 2010), http://www.parliament.uk/business/committees/committees-archive/culture-media-and-sport/cms100224/ (quoting John Whittingdale: "It is a humiliation that US legislators have felt it necessary to take steps to protect freedom of speech from what are seen as unreasonable incursions by our courts").

[18] *See* Defamation Act 2013, c. 26 (U.K.); *see generally* Allistair Mullis & Andrew Scott, *Tilting at Windmills: The Defamation Act 2013*, 77(1) MODERN L. REV. 87 (2014).

action" [19] against a party not domiciled in the United Kingdom, a Member State of the European Union, or a state that is a contracting party to the Lugano Convention,[20] "unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement."[21] This law is likely to reduce the number of English libel judgments against American publishers and thus minimize the legal friction between the two countries.

The American refusal to recognize and enforce English libel and slander awards is only one part of the story about how the principles of defamation law have diverged in these two great common law jurisdictions. This article

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[19] *See* Defamation Act 2013, *Explanatory Notes*, ¶ 66, http://www.legislation.gov.uk/ukpga/2013/26/notes/division/5/4 (last visited Jan. 15, 2016) (hereinafter "2013 *Explanatory Notes*"); *see also id.* at ¶ 7 ("Most of the Act's provisions extend to England and Wales only, but certain provisions also extend to Scotland.").

[20] *See* Allan Rosas, *EU External Relations: Exclusive Competence Revisited*, 38 FORDHAM INT'L L.J. 1073, 1096 (2015) ("The Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, provides for an extension of most of the rules of an internal EU regulation to some non-member states.").

[21] Defamation Act 2013, c. 26 § 9 (U.K.).

explores that larger story. Part II discusses shared principles. Part III considers the most important differences between English and American defamation law. Part IV notes other doctrinal variations. Part V offers concluding thoughts.

II. SHARED PRINCIPLES

In many respects, the relevant principles of English and American defamation law are so similar that they seem to have been written with the same pen. For example:

- "substantially true" statements are not actionable;[22]
- a defamatory communication must have been published to a third person other than the plaintiff;[23]

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[22] *See* Defamation Act 2013, c. 26 § 2(1) (U.K.) ("It is a defence to an action for defamation . . . that the imputation conveyed by the statement complained of is substantially true."); *id.* § 2(3) (U.K.) ("If one or more of the imputations is not shown to be substantially true, the defence under this section does not fail if, having regard to the imputations which are shown to be substantially true, the imputations which are not shown to be substantially true do not seriously harm the claimant's reputation."); Nichols v. Moore, 477 F.3d 396, 399 (6th Cir. 2007) ("If the gist, the sting, of the article is substantially true, the defendant is not liable.") (quoting Fisher v. Detroit Free Press, Inc. N.W. 2d 765, 767-68 (1987); Neely v. Wilson, 418 S.W.3d 52, 63-64 (Tex. 2013) ("A broadcast with specific statements that err in the details but that correctly convey the gist of a story is substantially true" and therefore not actionable.).

- whether an assertion is defamatory is determined from the perspective of a reasonable person;[24]
- printers, distributors, and sellers of publications are not liable for defamation if they are unaware of a publication's libelous content;[25]

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[23] *See* Neill, *supra* note 7, at 69; RESTATEMENT (SECOND) OF TORTS § 557 (1) (AM. LAW INST. 1977).

[24] *See* Neill, *supra* note 7, at 38; Amrak Prods., Inc. v. Morton, 410 F.3d 69, 72 (1st Cir. 2005) ("The communication 'must be interpreted reasonably,' leading a 'reasonable reader' to conclude that it conveyed a defamatory meaning.") (quoting Foley v. Lowell Sun Publ'g Co., 533 N.E.2d 196, 197 (1989)).

[25] English law now reflects "an underlying policy that claimants should be encouraged, where possible, to sue the person from whom the defamatory material originates, rather than those who facilitate its dissemination." Neill, *supra* note 7, at 7. *See* Defamation Act 1996, c. 31 § 1(1), (3) (U.K.) ("(1) In defamation proceedings a person has a defence if he shows that—(a) he was not the author, editor or publisher of the statement complained of . . . and (c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement. . . . (3) A person shall not be considered the author, editor or publisher of a statement if he is only involved—(a) in printing, producing, distributing or selling printed material containing the statement."); *see also* Defamation Act 2013, c. 26 § 10 (1) (U.K.) ("A court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of unless the court is satisfied that

it is not reasonably practicable for an action to be brought against the author, editor or publisher.").

Similarly, American law distinguishes between "publishers" (who are subject to defamation liability) and mere "distributors" (who are not). Bookstores, public libraries, printers, and newspaper deliverers are usually classified as distributors if they are unaware of the defamatory content of the materials they disseminate. *See* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 139 (S.D.N.Y. 1991) ("With respect to entities such as news vendors, book stores, and libraries, . . . New York courts have long held that vendors and distributors of defamatory publications are not liable if they neither know nor have reason to know of the defamation.") (quoting Lerman v. Checkleberry Publ'g, Inc., 521 F. Supp. 228, 235 (S.D.N.Y. 1981)); *cf.* Flowers v. Carville, 266 F. Supp. 2d 1245 (D. Nev. 2003) (holding that the plaintiff stated a claim against a publisher who allegedly knew that a book contained false and defamatory statements).

However, there is no rule of American law that saves a culpable secondary publisher from liability merely because that person did not originate the defamatory statement. *Cf.* Restis v. Am. Coal. Against Nuclear Iran, Inc., 53 F. Supp. 3d 705, 725 (S.D.N.Y. 2014) (noting the well-accepted principle that the republication of defamatory statements itself constitutes defamation under New York law). In many cases, it is easier for a libel or slander plaintiff to prove a prima facie case against the originator of a statement than against a person who repeats the statement. This is true because plaintiffs normally must show that the defendant acted with fault as to the falsity of the statement (i.e., knowledge of its falsity or lack of care regarding truth or falsity). *See Restis*, 53 F. Supp. 3d at 725-26. Often a person who merely repeats statement cannot be shown to have acted with "actual malice" or to have

- in limited circumstances, liability is imposed for failure to remove a defamatory statement posted by another;[26]
- aggregate communications are governed by a single publication rule for purposes of the statute of limitations;[27]

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even been negligent by reason of failing to conduct an investigation of the truth or falsity of the charge. *Cf.* Flowers v. Carville, 310 F.3d 1118, 1130 (9th Cir. 2003) ("One who repeats what he hears from a reputable news source, with no individualized reason external to the news report to doubt its accuracy, has not acted recklessly.").

[26] *See* Byrne v. Deane, [1937] 1 KB 818 (Eng.); RESTATEMENT (SECOND) OF TORTS § 577 cmt. p (AM. LAW INST. 1977).

[27] *See* Defamation Act 2013, c. 26 § 8(3) (U.K.) ("any cause of action against the person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication"). With respect to websites, the concern that led to the enactment of section 8 was that publishers "may cavil at the perpetual risk of suit, and so renege altogether on maintaining internet archives of past publications." Mullis & Scott, *supra* note 18, at 102. *See also* RESTATEMENT (SECOND) OF TORTS § 577A (AM. LAW INST. 1977) ("(3) Any one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication. (4) As to any single publication, (a) only one action for damages can be maintained; (b) all damages suffered in all jurisdictions can be recovered in the one action; and (c) a judgment for or against the plaintiff upon the merits of any action for

- the originator of a defamatory utterance may be responsible for damages caused by foreseeable republication,[28] and thus the sender of a defamatory

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damages bars any other action for damages between the same parties in all jurisdictions."); *see also* Bríd Jordan, *The Modernization of English Libel Laws and Online Publication*, 14 J. INTERNET L. 3, 6 (2011) ("A single publication rule provides that a cause of action accrues when material is first published not when it is read or subsequently accessed online, sold, or a copy otherwise provided to a reader. In the case of an Internet publication, the single publication rule deems publication to be when the material is first uploaded onto the Internet.").

[28] *See* McManus v. Beckham, [2002] EWCA (Civ) 939 [34], [2002] ALL ER 497 [34] (Lord Waller, LJ) (appeal taken from EHWC) (QC) ("If a defendant is actually aware (1) that what she says or does is likely to be reported, and (2) that if she slanders someone that slander is likely to be repeated in whole or in part, there is no injustice in her being held responsible for the damage that the slander causes via that publication."); Tunca v. Painter, 965 N.E.2d 1237, 1262 (Ill. App. Ct. 2012) ("a defamer is liable for damages caused by repetitions that were reasonably foreseeable, or the natural and probable consequence of his original statement."); *but see* Geraci v. Probst, 938 N.E.2d 917, 921 (N.Y. 2010) ("[A]bsent a showing that [defendant] approved or participated in some other manner in the activities of the third-party republisher" . . . , there is no basis for allowing the jury to consider the article containing the republished statement as a measure of plaintiff's damages attributable to defendants.") (quoting Karaduman v. Newsday, Inc., 416 N.E.2d 557, 560 (N.Y. 1980).

letter may be liable for publishing its contents to a third person other than the addressee who foreseeably reads the letter;[29] and

- slanderous imputations of a serious criminal offense or incompetence in business, trade, or profession may be actionable without proof of special damages.[30]

In both England and the United States, litigating a defamation case is expensive.[31] On both sides of the

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It is breathtaking to consider just what the foreseeable republication rule may mean in the digital age. It has been argued that with respect to an article by a mainstream journalist, "all . . . blogposts, tweets, links, likes and so on are the reasonably foreseeable result of the initial publication" and "all secondary publication and harm it causes is attributable in law to the tort caused by the original publication." Mullis & Scott, *supra* note 18, at 97.

[29] *See* Theaker v. Richardson, [1962] 1 WLR 151 (Eng.) (involving a husband who read his wife's letter); RESTATEMENT (SECOND) OF TORTS § 577 cmt. b, illus. 6 (AM. LAW INST. 1977) ("A knows that B is frequently absent and that in his absence his secretary opens and reads his mail.").

[30] *See* Neill, *supra* note 7, at 57; RESTATEMENT (SECOND) OF TORTS § 570 (AM. LAW INST. 1977) (listing the categories of slander per se). In England, unlike America, slander imputing that the plaintiff has a loathsome disease is no longer actionable per se. *See* Defamation Act 2013, c. 26 § 14(2) (U.K.).

[31] *See* Mullis & Scott, *supra* note 18, at 88 ("costly and burdensome"); David A. Logan, *Libel Law in the Trenches: Reflections on Current Data on*

Atlantic, the complexity of the principles governing libel and slander actions makes it difficult for publishers to assess the legality of their actions.[32]

III. IMPORTANT DIFFERENCES

One of the major differences between English and American defamation law relates to the governing provisions. In England, a unified body of common law and statutory principles governs all libel and slander cases. In contrast, in the United States, tort law is mainly state law, and therefore it differs to some extent throughout the fifty states and the District of Columbia. Consequently, it is sometimes easier to speak confidently about the substance of English law than to summarize the content of the corresponding American principles.

Libel Litigation, 87 VA. L. REV. 503, 525 (2001) ("[I]t is . . . very expensive for a media defendant to mount a trial defense. . . .").

[32] *See* Mullis & Scott, *supra* note 18, at 88 (the process "fail[s] to provide . . . clarity"); Joseph H. King, Jr., *Deus ex Machina and the Unfulfilled Promise of* New York Times v. Sullivan*: Applying the Times for All Seasons*, 95 Ky. L.J. 649, 657 (2007) ("The hirsute contours of the public figure-private figure dichotomy have been especially vague for the involuntary public figure subcategory.").

As explained in the following sections, there are important differences between English and American law relating to the burden of proof on truth or falsity; the need to establish culpability; the actionability of opinions; the significance of a statement's relationship to a matter of public interest; the availability of jury trials; and the scope of remedies.

A. BASIC CHOICE OF VALUES

English defamation law is in many respects pro-plaintiff,[33] whereas American defamation law is largely pro-defendant. This is true because of a choice of values. In any society, the law governing defamation reflects "the assumptions of that society respecting the relative

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[33] *See* Brown & Pintade, *supra* note 12, at 2 (explaining that in suits against American defendants ". . . English defamation law tilt[s] the scales dramatically toward plaintiffs."); Levi, *supra* note 10, at 511 (referring to Britain's "reputation-protecting libel laws"); *see also* Reynolds v. Times Newspapers Ltd., [2001] AC 127 (HL) 210 (appeal taken from N. Ir.) (quoting WEIR, A CASEBOOK ON TORT 528 (8th ed., 1996)) (quoting WEIR, A CASEBOOK ON TORT 528 (8th ed., 1996)) (stating that "the law of England is certainly stricter than that of any free country").

importance of an untarnished reputation, on the one hand, and an uninhibited press, on the other."[34]

1. ENGLISH LAW IS PRO-REPUTATION, PRO-PLAINTIFF

English defamation law places a priority on protecting the reputations of potential plaintiffs.[35] That choice is today anchored in the text of the European Convention on Human Rights (ECHR) and in the United Kingdom's Human Rights Act.

Article 10 of the ECHR, which deals with freedom of expression, provides that:

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[34] Frederick Schauer, *Social Foundations of the Law of Defamation: A Comparative Analysis*, 1 J. MEDIA L. & PRAC.3 (1980).

[35] *See* George B. Delta and Jeffrey H. Matsuura, *Defamation and the Internet around the World*, *in* LOTIN, LAW OF THE INTERNET § 11.04 (2015 supp.) ("U.K. defamation . . . is much friendlier to plaintiffs. The United Kingdom prizes an individual's reputation more than the United States. Because it also prizes freedom of the press to a much lesser extent than the United States, U.K. defamation law provides little protection to the press when it criticizes government officials."); *see also* Reynolds v. Times Newspapers Ltd, [2001] AC 127 (HL) 192 (appeal taken from N. Ir.) ("Historically the common law has set much store by protection of reputation.").

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. . . .
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[36]

As explained by the House of Lords in Reynolds v. Times Newspapers Ltd.:

> Under section 12 of the Human Rights Act 1998, . . . [a] court is required, in relevant

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[36] Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Mar. 9, 1953, E.T.S. No. 005.

> cases, to have particular regard to the importance of the right to freedom of expression. The common law is to be developed and applied in a manner consistent with Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . , and the court must take into account relevant decisions of the European Court of Human Rights . . . . To be justified, any curtailment of freedom of expression must be convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved.[37]

2. AMERICAN LAW IS PRO-SPEECH, PRO-DEFENDANT

In contrast to England, the United States has decided—in a wide range of cases involving matters of public interest—that free expression and vigorous public debate are often more important than compensating plaintiffs for harm caused by defamatory falsehood. "It is

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[37] Reynolds v. Times Newspaper Ltd., [2001] AC 127 (HL) 200 (Lord Nicholls of Birkenhead).

hardly an exaggeration to describe the United States as exceptional in its commitment to free speech as a right."[38] In the field of libel and slander, "[d]ozens of rules conspire to favor defamation defendants . . . [which] means that victims of false and defamatory statements are often left without effective remedies."[39] Notably, "[i]n the United States, reputation is not one of the fundamental rights protected by the Fourteenth Amendment to the Constitution."[40]

B. FALSITY AND FAULT

As indicated above,[41] England and the United States agree that a plaintiff cannot prevail in a libel or slander action based on an expressed or implied statement that is true or substantially true. However, the two countries differ as to whether the plaintiff or defendant has the burden of proof regarding the truth or falsity of the defamatory

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[38] Youm, *supra* note 5, at 415.

[39] VINCENT R. JOHNSON, ADVANCED TORT LAW: A PROBLEM APPROACH 163 (2d ed. 2014).

[40] Youm, *supra* note 5, at 420.

[41] *See* note 22, *supra*.

statement, and whether the plaintiff must show that the defendant was at fault as to the falsity of the statement (i.e., acted knowingly, recklessly, or negligently). These are the most significant of the many differences between English and American defamation law.

1. PRESUMED FALSITY VERSUS PRESUMED TRUTH

In England, the falsity of a defamatory statement is presumed, and truth is a defense to be pleaded and proved by the defendant.[42] Thus, section 2 of Defamation Act 2013 provides in relevant part:

> (1) It is a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true.[43]

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[42] *See* Reynolds v. Times Newspapers Ltd., [2001] AC 127 (HL) 192 (appeal taken from N. Ir.) ("The plaintiff is not required to prove that the words are false. Nor, in the case of publication in a written or permanent form, is he required to prove he has been damaged. . . . Truth is a complete defence. If the defendant proves the substantial truth of the words complained of, he thereby establishes the defence of justification.").

[43] Defamation Act of 2013, c. 26 § 2(1) (U.K.).

Section 2, which took effect on January 1, 2014, abolished and replaced what was previously known as the defense of "justification."[44]

In contrast, in the United States, there is generally no presumption that a defamatory statement is false. Rather, the falsity of the charge must be proved by the plaintiff. This makes it difficult for a libel or slander plaintiff to prevail under American law.

The American erosion of the English rule that presumes the falsity of a defamatory statement began with New York Times v. Sullivan[45] in 1964. That case started the "constitutionalization" of American defamation law by holding that the first amendment guarantees of free speech and free press limit the ability of states to award damages for libel and slander. By 1986, the United States Supreme Court further held, in Philadelphia Newspapers, Inc. v. Hepps, [46] that "the common-law presumption that

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[44] *Id.* at c. 26 § 2(4) (U.K.) ("The common law defence of justification is abolished. . . .").

[45] New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) ("[T]he Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct.").

[46] Philadelphia Newspapers v. Hepps, 475 U.S. 767, 777 (1986).

defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." More recently, lower federal[47] and state[48] courts have followed that lead by broadly holding that the presumption of falsity also does not apply to other kinds of cases, though there are rare decisions to the contrary.[49]

Whether the plaintiff or defendant has the burden of proof on truth or falsity is a matter of great importance that often determines who ultimately prevails. This is particularly true in the case of generalized charges that are

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[47] *See* Hayes v. Lange, No. 08-0042-CV-W-HFS, 2010 WL 1170139, at *4 (W.D. Mo. Mar. 22, 2010) ("Under Missouri law, . . . a claimant must establish six elements: (1) publication; (2) of a defamatory statement; (3) that identifies the claimant; (4) that is false; (5) that is published with the requisite degree of fault: and (6) damages the claimant's reputation.").

[48] *See* Batson v. Shiflett, 602 A.2d 1191, 1212 (Md. 1992) (stating in a defamation action commenced by a public figure against a union and its president, based on statements in leaflets and speeches, that "[t]he burden of proving falsity is on the plaintiff; truth is not an affirmative defense.").

[49] *See* Cummins v. Bat World Sanctuary, No. 02-12-00285-CV, 2015 WL 1641144, at *10 (Tex. App. Apr. 9, 2015) (holding in a case involving a matter of public concern—animal cruelty—that because the plaintiff was not a public figure, and the defendant was not a media entity, the defamatory statements were presumed to be false).

difficult to prove or disprove. As the American Law Institute has explained:

> Placing the burden on the party asserting the negative necessarily creates difficulties, and the problem is accentuated when the defamatory charge is not specific in its terms but quite general in nature. Suppose, for example, that a newspaper publishes a charge that a storekeeper short-changes his customers when he gets a chance. How is he expected to prove that he has not short-changed customers when no specific occasions are pointed to by the defendant?[50]

The difference in how England and the United States allocate the burden of proof on falsity is stark, except during the preliminary stages of litigation.[51] Under American law, on a motion for summary judgment, a libel or slander defendant must show that there is no issue of material fact in order to prevail on the ground that the allegedly defamatory

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[50] RESTATEMENT (SECOND) OF TORTS § 613 cmt. j (1977).

[51] *See* Neely v. Wilson, 418 S.W.3d 52, 62 (Tex. 2013) ("This distinction is less material at the summary judgment stage. . . .").

statement was substantially true.[52] In other words, when substantial truth is the issue, a defendant seeking an early termination of the litigation via a motion for summary judgment has the burden of proving the truth of the defamatory utterance. In England, that burden is always on the defendant—though the defendant may prevail on other grounds such as qualified privilege.

2. STRICT LIABILITY VERSUS FAULT AS TO FALSITY

English law is favorable to libel and slander plaintiffs[53] not only because defamatory statements are presumed to be false, but because defendants are held strictly liable, if no affirmative defense is established. It is not necessary for a plaintiff to prove that the defendant knew that the defamatory statement was false or even acted recklessly or negligently with respect to truth or falsity.

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[52] *Cf.* Klentzman v. Brady, 312 S.W.3d 886, 903 (Tex. App. 2009) (holding that the defendants in a defamation action "did not meet their burden" to establish that "no genuine issue of material fact" existed regarding the substantial truth of an article).

[53] *See* Samson, *supra* note 3, at 782 ("English libel law is still plaintiff-friendly.").

From an American perspective, this imposition of strict liability is amazing. To begin with, strict liability is rarely imposed in tort actions under American law. The notable exceptions are certain theories of vicarious liability (generally involving employers), [54] products liability (typically arising from manufacturing defects),[55] and liability for harm caused by certain dangerous animals [56] or hazardous activities.[57] Otherwise, tort liability in the United States normally depends on proof of the defendant's fault. Arguing the defendant should be strictly liable in circumstances falling outside the established categories is normally not a viable option.

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[54] *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006) (AM. LAW INST. discussing *respondeat superior* liability); RESTATEMENT (SECOND) OF AGENCY § 214 (AM. LAW INST. 1958) (discussing liability for non-delegable duty); *id.* § 228 (discussing the scope of employment for *respondeat superior* liability).

[55] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIAB. § 2(a) (1998) (discussing liability for manufacturing defects).

[56] *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 22 (2010) (discussing wild animals); Harris v. Anderson Cnty. Sheriff's Office, 673 S.E.2d 423 (S.C. 2009) (discussing strict liability for dog bites).

[57] *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 20 (2010) (discussing abnormally dangerous activities).

More important, the idea of imposing strict liability for oral or written statements is startling to Americans because such liability would pose a serious threat to the principles of free speech and free press that are enshrined in the first amendment to the United States Constitution.[58] In regard to speech about matters of public concern, imposing strict liability would chill free expression and run counter to America's "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."[59]

3. CATEGORICAL BRIGHTLINES VERSUS BALANCING

Today, in the United States, defamation cases are divided into three categories,[60] and the applicable category determines what level of fault as to falsity the plaintiff must prove. In the first category—actions by public officials or public figures suing with respect to matters of public concern, such as their conduct, fitness, or qualifications—the

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[58] U.S. CONST. AMEND. 1 ("Congress shall make no law . . . abridging the freedom of speech, or of the press. . ..").

[59] New York Times Co. v. Sullivan, 84 S. Ct. 710, 721 (1964).

[60] *See* Johnson, *supra* note 39, at 165-66 (summarizing the three categories).

plaintiff must prove what is called "actual malice." In American law, "actual malice" is a special term which means that the plaintiff must show the defendant acted with knowledge of falsity of the defamatory statement or reckless disregard for whether it was true.[61] In the second category of American cases—actions by private persons suing with respect to matters of public concern—the federal Constitution requires proof the defendant was at least negligent as to the falsity of the defamatory utterance.[62] States are free to impose a higher standard for fault as to falsity, though courts only occasionally do so.[63] Finally, in the third category of cases—actions involving any person suing with regard to a matter of purely private concern—the United States Supreme Court has not yet ruled on what level of fault as to falsity is constitutionally required.[64] In the

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[61] *See* New York Times Co. v. Sullivan, 84 S. Ct. 710, 726 (1964) (dealing with public officials); Curtis Pub. Co. v. Butts, 87 S. Ct. 1975, 1991 (1967) (dealing with public figures).

[62] Gertz v. Robert Welch, Inc., 94 S. Ct. 2997, 3010 (1974) ("[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.").

[63] Poyser v. Peerless, 775 N.E.2d 1101 (Ind. Ct. App. 2002) (requiring actual malice).

[64] The leading case on defamation involving matters of purely private concern is Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct.

absence of guidance from the Supreme Court, many states require proof the defendant was negligent as to the falsity of the defamatory statement.[65] The constitutional requirement that a defamation plaintiff prove actual malice or negligence as to falsity "has, as a practical matter, made it necessary for the plaintiff to allege and prove the falsity of the communication, and from a realistic standpoint, has placed the burden of proving falsity on the plaintiff."[66]

In contrast, English law has rejected the use of categories in defamation cases. As explained by the House of Lords, "a test expressed in terms of a category of cases,

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2939 (1985). The opinion by Justice Lewis Powell was silent on whether a plaintiff needed to prove fault as to falsity. *See* Ruth Walden & Derigan Silver, *Deciphering Dun & Bradstreet: Does the First Amendment Matter in Private Figure-Private Concern Defamation Cases*, 14 COMM. L. & POL'Y 1, 15-16 (2009) (opining that subsequent federal and state court decisions "run the gamut from assertions that *Dun & Bradstreet* swept away all First Amendment requirements in . . . suits [where private persons are suing with respect to matters of private concern] to unequivocal declarations that the case affected nothing but the fault requirement for presumed and punitive damages.").

[65] *See, e.g.*, WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 571 (Tex. 1998) (holding a private individual suing a media defendant must prove that the defendant was negligent regarding the truth of the statement).

[66] RESTATEMENT (SECOND) OF TORTS § 613 cmt. J (AM. LAW INST. 1977).

such as political speech, is at variance with the jurisprudence of the European Court of Human Rights which in cases of competing rights and interests requires a balancing exercise in the light of the concrete facts of each case."[67] From an American perspective, that type of search for perfect justice via a careful, fact-specific balancing in every suit undermines the certainty of the law. Because there are no bright lines, the media and other potential defendants are deprived of fair notice as to whether their statements will give rise to liability because everything depends on the facts and how they are later weighed.

4. THE DEMANDING AMERICAN "ACTUAL MALICE" STANDARD

The great difference between the English strict liability rule and the American "fault as to falsity" requirements is even larger than might first appear due to the demanding way in which the American "actual malice" standard has been interpreted by the United States Supreme Court.

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[67] Reynolds v. Times Newspapers Ltd, [2000] H.R.L.R. (HL) 134, 134 (Lord Cooke of Thorndon) (appeal taken from Eng.) ("[T]here is in my opinion no good reason why politicians should be subjected to a greater risk than other leading citizens, or for that matter any other persons, of false allegations of fact in the media.").

First, reckless disregard for the truth is judged subjectively, not objectively. Thus, in order to establish recklessness, the plaintiff must prove that the defendant acted with subjective awareness of the probable falsity of the statement.[68] Consequently, evidence that the defendant acted unreasonably or unprofessionally is of limited use in establishing actual malice.[69] The question is not what the defendant should have done, or what a reasonable person would do, but whether the defendant, in publishing the

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[68] *See* Curtis Pub. Co. v. Butts, 388 U.S. 130, 153 (1967) (indicating that public officials are permitted to recover in libel only when they can "prove that the publication involved was deliberately falsified, or published recklessly despite the publisher's awareness of probable falsity"); *see also* Trump v. O'Brien, 29 A.3d 1090, 1101 (N.J. Super. Ct. App. Div. 2011) (holding that a billionaire who brought a libel action against the author of a book which understated his wealth failed to establish actual malice because "[n]othing suggests that O'Brien was subjectively aware of the falsity of his source's figures or that he had actual doubts as to the information's accuracy."); WJLA-TV v. Levin, 564 S.E.2d 383, 391 (Va. 2002) (holding that a television station's use of the statements of a physician, which the station knew the physician had retracted, was sufficient to support a jury finding of actual malice in a case involving alleged sexual assault).

[69] *See* Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 665 (1989) ("[A] public figure plaintiff must prove more than an extreme departure from professional standards.").

statement, displayed conscious disregard for the probable falsity of the defamatory statement.

Second, the United States Supreme Court has held that actual malice must be proved by "clear and convincing evidence,"[70] not only at the jury stage, but on motions for summary judgment.[71] Showing by a mere "preponderance of the evidence"[72] that the defendant acted with knowledge of the statement's falsity, or reckless disregard for the truth, is insufficient to trigger liability if actual malice is required. In the United States, a preponderance of the evidence is a far less compelling showing of fault than clear and convincing evidence.[73]

Third, the Supreme Court has made clear that "actual malice" entails an inquiry into the defendant's state of mind

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[70] *See id.* at 661 n.2.

[71] *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255–56 (1986).

[72] *See Preponderance of the Evidence*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "preponderance of the evidence" as "the greater weight of the evidence . . . the stronger evidence, however slight the edge may be").

[73] *See Evidence*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "evidence" and stating that "clear and convincing evidence" . . . is "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain").

about the truth or falsity of the statement, not merely an inquiry into the defendant's motives.[74] Thus, American courts routinely hold that evidence of what is sometimes called "express malice" or "common law malice"—meaning spite, ill will, or vindictiveness—does not by itself establish the "actual malice" that the Constitution requires.[75] In contrast, under English law, "[f]reedom of speech does not embrace freedom to make defamatory statements out of personal spite."[76]

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[74] *See* Freedom Newspapers of Texas v. Cantu, 168 S.W.3d 847, 858 (Tex. 2005) ("'[A]ctual malice concerns the defendant's attitude toward the truth, not toward the plaintiff.' While a personal vendetta demonstrated by a history of false allegations may provide some evidence of malice, free-floating ill will does not.").

[75] *See* Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 665 (1989) ("[A] newspaper's motive in publishing a story—whether to promote an opponent's candidacy or to increase its circulation—cannot provide a sufficient basis for finding actual malice."); *see also* Garrison v. State of La., 379 U.S. 64, 73 (1964) (stating, in a criminal defamation case, that "[u]nder a rule ... permitting a finding of [actual] malice based on an intent merely to inflict harm, rather than to inflict harm through falsehood, 'it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded'.").

[76] Reynolds v. Times Newspapers Ltd, [2000] H.R.L.R. (HL) 134, 149 (Lord Nicholls of Birkenhead) (appeal taken from Eng.).

Fourth, the United States Supreme Court has ruled that during the appellate process, in a defamation suit, each court must conduct a de novo assessment of whether the evidence mustered by the plaintiff satisfies the demanding requirements of the actual malice standard.[77] No deference is given to the findings of lower courts.

Quite possibly, these interpretive and procedural aspects of the American "actual malice" standard do more to protect defendants from liability—and to enlarge the gap between English and American law—than the fault requirements of the actual malice standard itself. They also provide great breathing room for political discussion in a democracy, while at the same time articulating clear standards for imposition of liability in the most egregious cases; such as where the media fabricates a story or seriously distorts information. In contrast, the strict liability and presumed falsity principles of English law threaten to ensnare, with civil liability, persons whose statements may have been inaccurate, but were in no real sense highly blameworthy.

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[77] *See* Bose Corp. v. Consumers Union of the U.S., Inc., 104 S. Ct. 1949, 1967 (1984) ("Appellate judges . . . must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.").

C. STATEMENTS OF OPINION

England and the United States both struggle with the issue of whether statements of opinion can form the basis for a defamation action.[78] Both countries recognize that some comments cloaked in the language of opinion are really statements of fact, or imply facts,[79] and are therefore actionable if the asserted or implied facts are false. Both countries also recognize that some comments expressing opinions are not actionable. However, England and the United States differ in where they locate the relevant legal analysis, and how they define its operative terms. This is an important difference.

In the United States, the analysis is usually part of the plaintiff's prima facie case, for in a tort action based on

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[78] *See* GATLEY ON LIBEL AND SLANDER 430-433 (12th ed. 2013) (Alastair Mullis et al. eds.) (discussing the distinction between fact and comment); Milkovich v. Lorain Journal, 497 U.S. 1, 18 (1990) ("[E]xpressions of 'opinion' may often imply an assertion of objective fact").

[79] *See* Joseph v. Spiller, [2011] 1 A.C. 852, at para. 17 (Lord Phillips) ("To say that a man's conduct was dishonourable is not comment, it is a statement of fact. To say that he did certain specific things and that his conduct was dishonourable is a statement of fact coupled with a comment") (quoting Myerson v. Smith's Weekly Publishing Co Ltd. (1923) 24 SR (NSW) 20, 26).).

expression, the federal constitution requires the plaintiff to prove that the defendant published a false statement of fact.[80] Thus, if there is an issue as to whether an opinion was really an assertion of fact, or implied false facts, the plaintiff bears the burden of proof, and the risk of non-persuasion.[81]

In contrast, in England, the issue is normally addressed in the context of an affirmative defense, that allows the defendant to escape liability for certain statements of opinion. Thus, in England, the burden of proof and risk of non-persuasion fall on the defendant.

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[80] *Cf.* Hustler Magazine, Inc. v. Falwell, 108 S. Ct. 876, 882 (1988) (applying the constitutional false fact requirement to the tort of intentional infliction of emotional distress).

[81] American courts have ruled that statements were incapable of implying false facts where the defendant described a physician as a "real tool" (*see* McKee v. Laurion, 825 N.W.2d 725, 733 (Minn. 2013)); called a union's attorney "a very poor lawyer" (*see* Sullivan v. Conway, 157 F.3d 1092 (7th Cir. 1998)); and characterized the chairman of an election board as a "lying asshole" (*see* Greenhalgh v. Casey, 67 F.3d 299 (6th Cir. 1995)). Other American courts found that a jury could find that a statement was an assertion of fact where a talk show moderator repeatedly accused a judge of being "corrupt" (*see* Bentley v. Bunton, 94 S.W.3d 561 (Tex. 2002)); a directory described a lawyer as an "ambulance chaser" (*see* Flamm v. American Ass'n of Univ. Women, 201 F.3d 144 (2d Cir. 2000)); and fictional literature labeled the plaintiff a "slut" (*see* Bryson v. News Am. Pubs., Inc., 672 N.E.2d 1207 (Ill. 1996)).

1. ENGLAND'S HONEST OPINION DEFENSE

The traditional defense of "fair comment," long recognized by English law,[82] has been replaced by a new statutory defense called "honest opinion."[83] This reform was intended to simplify "complex case law," reduce "technical difficulties," and generally make the defense more "user-friendly," especially in the context of "online and scientific discussions."[84] Section 3 of Defamation Act 2013 provides in relevant part:

> (1) It is a defence to an action for defamation for the defendant to show that the following conditions are met.
>
> (2) The first condition is that the statement complained of was a statement of opinion.
>
> (3) The second condition is that the statement complained of indicated, whether in

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[82] *See* Joseph v. Spiller, [2011] 1 A.C. 852, at para. 3-4 (discussing the elements of the fair comment defense).

[83] DEFAMATION ACT 2013, c. 26 § 3(8) ("The common law defence of fair comment is abolished").

[84] Mullis & Scott, *supra* note 18, at 92.

general or specific terms, the basis of the opinion.

(4) The third condition is that an honest person could have held the opinion on the basis of—

(a) any fact which existed at the time the statement complained of was published;

(b) anything asserted to be a fact in a privileged statement published before the statement complained of.

(5) The defence is defeated if the claimant shows that the defendant did not hold the opinion.

(6) Subsection (5) does not apply in a case where the statement complained of was published by the defendant but made by another person ("the author"); and in such a case the defence is defeated if the claimant shows that the defendant knew or ought to have known that the author did not hold the opinion.[85]

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[85] Defamation Act 2013, c. 26 § 3(7) ("For the purposes of subsection (4)(b) a statement is a 'privileged statement' if the person responsible for its publication would have one or more of the following defences if an action for defamation were brought in respect of it—(a) a defence under

The honest opinion defense, which has been described as "powerful," [86] fundamentally rests upon a statement's "recognisability as comment."[87] Unlike the rules that previously governed the fair comment privilege,[88] there is no need, under the honest opinion defense, for the comment to relate to a matter of public interest."[89] Nor is it necessary for the defendant "to prove the truth of every single allegation of fact relevant to the statement complained of."[90]

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section 4 (publication on matter of public interest); (b) a defence under section 6 (peer-reviewed statement in scientific or academic journal); (c) a defence under section 14 of the Defamation Act 1996 (reports of court proceedings protected by absolute privilege); (d) a defence under section 15 of that Act (other reports protected by qualified privilege).").

[86] Mullis & Scott, *supra* note 18, at 89.

[87] *Id.*; 2013 *Explanatory Notes*, *supra* note 19, at para. 20 ("[T]he statement must be recognizable as a comment as distinct from an imputation of fact."). Inasmuch as an inference of fact is a form of opinion, this would be encompassed by the defence. *Id.*

[88] *See* 2013 *Explanatory Notes*, *supra* note 19, at para. 19 ("does not include the current requirement for the opinion to be on a matter of public interest.").

[89] Mullis & Scott, *supra* note 18, at 89.

[90] 2013 *Explanatory Notes*, *supra* note 19, at para. 23 ("Condition 3 . . . refers to 'any fact' so that any relevant fact or facts will be enough" provided "an honest person would have been able to hold the opinion" in light of the sufficiency of the opinion.).

The requirement stated in subsection (3)—that the speaker must indicate "in general or specific terms"[91] the basis for the opinion—is consistent with ECHR principles. According to the Grand Chamber at Strasbourg, "even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it."[92] The flexibility of the disclosure obligation is said to be consistent with the nature of modern life "in which a passing reference to the previous night's celebrity show would be regarded by most of the public, and may sometimes have to be regarded by the law, as a sufficient factual basis."[93]

Certain aspects of the new honest opinion privilege are calculated to invite disagreement and criticism. For example, the language in subsection (4) conditions the existence of the defense on whether an honest person could have held the opinion based on existing facts, or on false assertions of fact that are privileged. Thus, the new statutory defense essentially imposes an objective standard. [94] This seems odd. Most persons, quite

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[91] Defamation Act 2013, c. 26 § 3(3) (UK).

[92] Joseph v. Spiller [2010] UKSC 53, [2011] 1 AC 852 [132] (Lord Walker SCJ).

[93] *Id.*, at para. 131 (Lord Walker).

[94] *See* 2013 *Explanatory Notes*, *supra* note 19, at para. 23 ("Condition 3 is an objective test . . . ."); Mullis & Scott, *supra* note 18, at 94 (describing section 3 as an "[a]lmost Wholly Objective Defense").

reasonably, would like to express their own opinions, not simply the opinions that could be held by some hypothetical "honest person." However, it is possible that an opinion honestly held by a defendant will not be protected by the "honest opinion" defense, even if it is recognizably a statement of opinion. To the extent this is true, the rule threatens to stifle free speech in England.

The "honest person" test articulated in subsection (4) may have been intended to broaden the protection for the expressions of opinion by saying that if any honest person knowing any available facts, or even privileged false assertions of fact, could have held the opinion, the defendant's expression of a recognizable and honestly held opinion is protected from liability. However, if that was the intention of the drafters, the language chosen to achieve that objective falls short of the mark. Rather than articulate a "clear and straightforward test" and "avoid the complexities" which had arisen in case law,[95] the honest opinion defense confusingly links objective and subjective requirements in a way that will leave many speakers uncertain about whether their statements are protected or are a risk liability. This is particularly troublesome because, in England, the defendant bears the burden of proving that an expression of opinion is permissible. Commentators have

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[95] 2013 *Explanatory Notes*, *supra* note 19, at para. 22.

noted that the objective test imposed by the third condition may "have profound and far-reaching ramifications."[96]

D. MATTERS OF PUBLIC INTEREST

England and the United States differ greatly on the significance of a defamatory statement's relationship to a matter of public interest. In England, that connection may constitute a complete defense to a claim for libel or slander. In the United States, in contrast, the connection between a defamatory statement and a matter of public interest rarely immunizes a defendant from liability.[97] Instead, it requires a libel or slander plaintiff to satisfy more demanding requirement in order to prevail.

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[96] Mullis & Scott, *supra* note 18, at 94.

[97] A few American jurisdictions have recognized the neutral-reportage privilege, which confirms a type of immunity on certain statements related to matters of public interest. *See* Edwards v. National Audubon Soc'y, Inc., 556 F.2d 113, 120 (2d Cir. 1977) (holding that the public interest in being informed about ongoing controversies justified creating a privilege to republish allegations made by a responsible organization against a public figure, if the republication is done accurately and neutrally in the context of an existing controversy); April v. Reflector-Herald, Inc., 546 N.E.2d 466, 469 (Ohio Ct. App. 1988) (finding "no legitimate difference between the press's accurate reporting of accusations made against a private figure and those made against a public figure, when the accusations themselves are newsworthy and concern a matter of public interest").

1. THE REYNOLDS PRIVILEGE

In 1999, in Reynolds v. Times Newspapers,[98] the House of Lords adopted "a qualified privilege for 'responsible reporting' on matters of public interest."[99] That qualified privilege for "responsible journalism"[100] was an important exception to the strict liability principle of English libel law requiring that "a defamatory statement must be proved true to avoid liability."[101] Prior to that time, it was thought that a communication to the world at large, as opposed to a communication to a particular person or persons intent on receiving it, did not enjoy the protection of a qualified privilege.[102] The Reynolds privilege was significant because if a journalist's publication of a statement turned out to be false, the publication was "nevertheless

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[98] [1999] 4 All E.R. 609 (H.L.) (Eng.).

[99] Lili Levi, *The Problem of Trans-National Libel*, 60 AM. J. COMP. L. 507, 519-20 (2012).

[100] *See* Reynolds v. Times Newspapers Ltd., [2001] 2 AC 127 (HL) 202 (appeal taken from Eng.) ("The common law does not seek to set a higher standard than that of responsible journalism[.]").

[101] Kyu Ho Youm, *Liberalizing British Defamation Law: A Case of Importing the First Amendment?* 13 COMM. L. & POL'Y 415, 437 (2008).

[102] *See* Low Kee Yang, Reynolds *Privilege Transformed*, 130 LAW Q. REV. 24, 25 (2014); *see also Reynolds*, 2 AC at 195 ("Frequently a privileged occasion encompasses publication to one person only or to a limited group of people. Publication more widely, to persons who lack the requisite interest in receiving the information, is not privileged.").

protected so long as [the journalist] had acted responsibly."[103]

2. THE 2013 STATUTORY PUBLIC INTEREST DEFENSE

The Defamation Act 2013 abolished Reynolds and restated the terms of a public interest defense. Section 4 of the Act provides:

> Publication on matter of public interest
>
> (1) It is a defence to an action for defamation for the defendant to show that—
>
> (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
>
> (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.
>
> (2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters

[103] Yang, *supra* note 102, at 25.

mentioned in subsection (1), the court must have regard to all the circumstances of the case.

(3) If the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party, the court must in determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it.

(4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.

(5) For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.

> (6) The common law defence known as the Reynolds defence is abolished.[104]

As defined by section 4, the public interest defense is open to criticism on a variety of grounds, including that it is both unclear and misdirected.

a. UNCLEAR

The meaning of "public interest" is not defined in the Defamation Act 2013, and has been left to judicial interpretation.[105] This omission creates uncertainty that is greatly compounded by the fact that courts are directed by subsection (4) to accord an unspecified degree of deference to the editorial judgment of potential media defendants.[106] The statutory language offers no list of factors to guide the exercise of judicial discretion. Consequently, the breadth of

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[104] Defamation Act 2013, c. 26, § 4 (Eng. and Wales), http://www.legislation.gov.uk/ukpga/2013/26/pdfs/ukpga_20130026_en.pdf.

[105] *See* Defamation Act 2013, c. 26, § 4, Explanatory Notes ¶ 30 (Eng. and Wales), http://www.legislation.gov.uk/ukpga/2013/26/notes/division/5/4/data.pdf.

[106] *See id.* at ¶ 33.

the public interest privilege is unclear, and potential claimants have little notice of the extent to which their reputational interests will be protected against media defendants. Quite sensibly, scholars have argued that "[p]ublishers . . . should not be permitted to justify serious allegations of fact [made] without evidence by reference to 'editorial freedom.'"[107]

b. TOO NARROW

In addition, the standard articulated by subsection (1)(b) misses the mark. Whether a statement contributes to the discussion of public issues depends on whether it is true or false,[108] not on whether the defendant reasonably believed that publishing was in the public interest. The stated test fails to focus on this important reality. Even if "reasonably believed" is equated with the absence of negligence as to the statement's falsity—which is by no means clear[109]—a

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[107] Alastair Mullis & Andrew Scott, *Tilting at Windmills: the Defamation Act 2013*, 77 MOD. L. REV. 87, 96 (2014).

[108] *Cf.* Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas[.]").

[109] *See* Mullis & Scott, *supra* note 106, at 90 (suggesting that the "reasonable belief" test may require only a belief that is based on "rational grounds").

negligence-based rule is arguably too narrow to accommodate the type of vigorous public debate that is expected in a world of constant news and quick decision making. A negligence calculus can often tip too easily in an unexpected direction, and that risk can discourage persons from participating in democratic debate. At least in discussions regarding the conduct and fitness of public officials and public figures, a privilege related to statements on matters of public interest needs to ensure greater breathing space to speakers (as does the American actual malice standard[110]).

c. Too Broad

As defined by Defamation Act 2013, the public interest defense may also be too broad, as well as too narrow. Under the language of subsection (5), a defamatory opinion that no honest person could have held, and which therefore would not pass muster under the honest opinion defense discussed above,[111] may nevertheless be protected under the public interest privilege if it relates to a matter of public interest and the defendant reasonably believed that making the statement was in the public interest.[112] To that

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[110] *See supra* Part III-B.

[111] Defamation Act 2013, C.26, §3(5) (UK).

[112] Mullis & Scott, *supra* note 18, at 95 (similar analysis).

extent, the public interest defense undercuts—or at least circumvents—the "honest person" requirement of the honest opinion defense.

The Explanatory Notes on Defamation Act 2013[113] endeavor to make clear that section 4's public interest defense is not a complete break with the past. The Notes state the new defense "is based on the existing common law defence established in Reynolds v. Times Newspapers and is intended to reflect the principles established in that case and in subsequent case law."[114] The Notes further indicate "the statutory defence is intended essentially to codify the common law defence."[115]

Still, it is clear section 4 has made important changes. Relying on the text of subsection (3), the Explanatory Notes state that "the defendant does not need to have verified the information reported before publication because the way that the report is presented gives a balanced picture."[116]

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[113] *See* Explanatory Notes, *supra* note 19.

[114] *Id.* at para 29.

[115] *Id.* at para. 35 (while "courts would be required to apply the words used in the statute, the current case law would constitute a helpful (albeit not binding) guide to interpreting how the new statutory defence should be applied.").

[116] *Id.* at para. 32.

This is something of a departure from prior practice. Reynolds had held that among the "matters to be taken into account" in determining whether a publisher met the standard of responsible reporting were the "steps taken to verify the information" and "[w]hether comment was sought from the plaintiff" because "[h]e may have information others do not possess or have not disclosed."[117]

Moreover, the statutory language of section 4 of Defamation Act 2013—which merely requires that the statement was in the public interest, and was reasonably believed by the defendant to be in the public interest—seems to be less demanding than prior case law. For example, in Flood v. Times Newspapers Ltd., Lord Brown wrote that under the Reynolds privilege the relevant inquiry was:

> could whoever published the defamation, given whatever they knew (and did not know) and whatever they had done (and had not done) to guard so far as possible against the publication of untrue defamatory material, properly have considered the publication in question to be in the public interest?[118]

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[117] Reynolds v. Times Newspapers Ltd [2001] 2 AC 127 (HL) 134.

[118] Flood v. Times Newspapers Ltd [2012] UKSC 12 [2012] 2 A.C. 273 at para 13 (emphasis added).

Some scholars have found the import of this language to be "expressed succinctly" in the standard set down in section 4 of Defamation Act 2013.[119] However, it can fairly be argued that having a reasonable belief "that publishing the statement complained of was in the public interest"[120] is a less demanding obligation than guarding "so far as possible" against the making of a defamatory utterance on a matter of public interest.[121]

3. CONTRASTING ENGLISH AND AMERICAN TREATMENT OF PUBLIC INTEREST

From a comparative perspective, it is clear that England and the United States differ substantially in how they treat matters of public interest in the law of defamation. In England, a defendant can escape liability by proving both that the statement related to a matter of public interest and that the defendant reasonably (i.e., non-negligently) believed that publishing the statement complained of was in the public interest. In contrast, in the United States, if a

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[119] Mullis & Scott *supra* note 18, at 91.

[120] Defamation Act 2013, c.26, §§ 4 (1)(b) (UK).

[121] *Flood*, [2012] UKSC 12, 2 A.C. 273 at para 113. (emphasis added).

defamatory statement relates to a matter of public interest, the plaintiff must prove the defendant was at least negligent as to the falsity of the statement (if the plaintiff is a private person) or acted with actual malice (if the plaintiff is a public official or public figure).[122] Thus, with respect to matters of public interest, England and the United States disagree both as to who has the burden of proof and as to what matter the defendant's culpability (or non-culpability) must relate. In England, non-culpability must relate to whether the matter was in the public interest; in the United States, culpability must relate to the falsity of the defamatory statement.

It is difficult to generalize about these competing perspectives on liability for defamation related to matters of public interest. Perhaps the most that can be said is that the American imposition of the burden of proof and heightened culpability requirements on the plaintiff is more likely than the English public interest defense to invite robust discussion of matters of public interest and to deny remedies for defamatory falsehood to those injured by such discussions. To that extent, English law is less protective of free expression than American law.

E. LIABILITY OF WEBSITE OPERATORS

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[122] *See* discussion *supra* Defamation Act 2013 c. 26 § 5(11) (UK).

Many of the key common law rules governing liability for defamation evolved long before the creation of the Internet. It is therefore not surprising England and the United States (and other countries such as China[123]) have enacted legislation to address the question of who bears liability for web-based publications.

In England, the Defamation Act 2013 creates two defenses that insulate website operators from liability for certain statements posted on their sites. However, these defenses are qualified by exceptions and offer less certain protection than the broadly stated immunities that are part of the American Communications Decency Act.[124] As a result, English law on website operator liability is more pro-plaintiff than the parallel provisions in American law.

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[123] With respect to the Internet, China has taken a very different legal path than England and the United States, "Network service providers who know that a user is violating the rights of another person are jointly and severally liable for harm which could be avoided by reasonable remedial measures on the part of the provider." Vincent R. Johnson, *The Rule of Law and Enforcement of Chinese Tort Law*, 34 T. JEFFERSON L. REV. 43, 86 (2011) (citing Tort Law of the People's Republic of China, art. 36 (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010) (Lawinfochina), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=182630.).

[124] 47 U.S.C.A. § 230 (West 2016).

1. DEFENSES IN ENGLAND

Section 5 of Defamation Act 2013 provides in relevant part:

> (1) This section applies where an action for defamation is brought against the operator of a website in respect of a statement posted on the website.
>
> (2) It is a defence for the operator to show that it was not the operator who posted the statement on the website.
>
> (3) The defence is defeated if the claimant shows that—
>
> (a) it was not possible for the claimant to identify the person who posted the statement,
>
> (b) the claimant gave the operator a notice of complaint in relation to the statement, and
>
> (c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.
>
> . . . .
>
> (11) The defence under this section is defeated if the claimant shows that the operator of the website has acted with malice

> in relation to the posting of the statement concerned.
>
> (12) The defence under this section is not defeated by reason only of the fact that the operator of the website moderates the statements posted on it by others.[125]

This new defense affords English website operators protection against liability arising from statements on their websites posted by third parties. In cases where the poster is not identifiable by the plaintiff, the effect of section 5 "is to encourage website operators voluntarily to disclose" the poster's identity and contact details.[126] If the poster of the defamatory statement is identifiable, "the website operator can safely leave up such a post, unless and until a court orders its removal," provided that the website operator is not responsible for the posted statement. [127] Such responsibility "might arise where, for example, the website operator had incited the poster to make the posting or had otherwise colluded with the poster."[128]

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[125] Defamation Act, 2013 c. 26 § 5 (UK).

[126] Mullis & Scott, *supra* note 18, at 100.

[127] *Id.*

[128] 2013 Explanatory Notes, *supra* note **Error! Bookmark not defined.**, at para. 42.

Since websites commonly offer a forum for the anonymous posting of comments or information by third parties, numerous questions are likely to arise related to the legal variables stated in subsection (3), such as: whether it was possible for the claimant to identify the poster; whether the claimant provided timely and adequate notice to the website operator of its complaint; and whether the operator failed to respond adequately. The Act defines what "notice of complaint" entails,[129] but is "silent as to the action required of a website operator in response to a notice of complaint."[130] The Act envisions the enactment and enforcement of a regulatory regime that will answer such questions. The defense offered by section 5 is hardly absolute.

Additional protection for website operators can be found in section 10 of the Defamation Act 2013, which provides in relevant part:

> (1) A court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of unless the court is satisfied that

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[129] Defamation Act 2013 c. 26 § 5(6).

[130] Mullis & Scott, *supra* note 18, at 100.

> it is not reasonably practicable for an action to be brought against the author, editor or publisher.[131]

This provision may be invoked by a website operator to defend against liability arising from statements posted by an identifiable person.[132] However, questions are certain to arise as to whether it is "reasonably practical" to sue a primary publisher who is insolvent, anonymous (but perhaps identifiable), or an American (against whom American courts will not enforce a judgment).[133] While section 10 offers important legal protection to website operators, that protection is limited.

2. DEFENSES IN THE UNITED STATES

In the United States, under section 230 of the Communications Decency Act of 1996, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by

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[131] Defamation Act 2013 c. 26 § 10; see also the discussion of Defamation Act 1996 Section 1(1), *supra* note 25.

[132] Mullis & Scott, *supra* note 18, at 100 (discussing section 10).

[133] *See id.*, at 101 (discussing examples); Part I (discussing the SPEECH Act).

another information content provider."[134] This provision has been broadly interpreted as barring defamation and other claims against Internet services and website operators.[135] With respect to actions for libel, section 230 confers a broad immunity that is a complete barrier to liability because publication is an essential element of a cause of action. For example, in Schneider v. Amazon.com, Inc.,[136] a Washington State court held that an online bookseller was not responsible for libelous comments posted about an author's books.

American courts have held that the immunity conferred by the Act is not lost simply because a website operator edits or deletes some of the information that has been posted. Thus, in Batzel v. Smith,[137] the United States Court of Appeals for the Ninth Circuit held that the operator of an anti-art-theft website, who posted an allegedly defamatory e-mail authored by a third party, and made only

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[134] 47 U.S.C.S. § 230(1)(c)(1) (2016).

[135] *See* Joseph v. Amazon.com, Inc., 46 F. Supp. 3d 1095, 1106 (W.D. Wash. 2014) (no liability for anonymous online reviews posted by others).

[136] 31 P.3d 37 (Wash. Ct. App. 2001).

[137] 333 F.3d 1018 (9th Cir. 2003).

minor alterations to the e-mail, could not be considered a content provider who was subject to liability.

The immunity conferred by section 230 does not depend on whether the person who posted information on a website is identifiable. Indeed, the immunity is so broad that website operators have no legal incentive to remove a defamatory posting by a third party, although some do so for business reasons.

Whether a website operator can be forced to disclose the identity of anonymous posters depends on the application of tests developed by the courts to determine whether disclosure will be judicially ordered.[138] In many cases, disclosure is denied because there is a constitutional right to speak anonymously, and that right is not lightly abridged.[139]

In summary, the American Communications Decency Act broadly insulates website operators from liability, and is essentially pro-defendant. In contrast, England law confers

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[138] *See* Krinsky v. Doe 6, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008) (describing four tests).

[139] *See* Thomson v. Doe, 356 P.3d 727, 735 (Wash. Ct. App. 2015) (holding that "supporting evidence should be required before the speaker is unmasked").

limited immunities on website operators, and to that extent is pro-plaintiff.

F. ROLE OF JURIES

England and the United States differ on whether juries play an important role in defamation litigation. The American practices—in contrast to many other aspects of American defamation law— are pro-plaintiff in the sense that they normally allow aggrieved victims of defamatory utterances to argue their case to a jury of peers, if they wish to do so.

1. RARE IN ENGLAND

Since the Defamation Act 2013 entered into force, libel and slander trials in England are conducted without a jury unless the court orders otherwise.[140] Consequently, "it is thought that jury trial in defamation actions will now be exceedingly rare."[141] This may have a "profound impact" on

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[140] Defamation Act 2013 c. 26 § 11 (UK).

[141] Neill, *supra* note 7, at 8.

the management of English cases.[142] As described by Mullis and Scott:

> It can be expected that applications for the early determination of the actual meaning of the words complained of will become commonplace. In turn, this will allow counsel to dispense with the need to prepare alternative arguments to accommodate the fact that a jury may select one meaning over another only at the end of the trial. . . . All told, the preliminary skirmishes in libel actions can be expected often to become decisive, as questions of seriousness of harm, meaning, fact or opinion fall to be determined earlier than has been common.[143]

This, too, is an aspect of American law that, uncharacteristically, is more pro-plaintiff than English law.

2. FREQUENT IN THE UNITED STATES

In contrast, in the United States, lay juries continue to play an important role in libel and slander litigation. Juries

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[142] Mullis & Scott, *supra* note 18, at 106.

[143] *Id.* at 106-07.

often resolve questions about such matters as whether a statement referred to the plaintiff;[144] whether the defendant acted with the requisite degree of fault;[145] or whether a qualified privilege has been lost because the defendant was motivated by common law malice.[146] American juries also determine the meaning of allegedly defamatory words if the statements are susceptible to more than one meaning.[147]

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[144] *Cf.* Diaz v. NBC Universal, Inc., 337 F. App'x 94, 96 (2d Cir. 2009) ("[A]ppellants' claim is incapable of supporting a jury's finding that the allegedly libelous statements refer to them as individuals."); Cullum v. White, 399 S.W.3d 173, 183 (Tex. App. 2011) ("Cullum attempted to explain his comments as merely referring to a fictional book he was writing, but . . . [t]he jury could infer from Cullum's reference to the website in the Raglin email that it referred to White and the Ranch.").

[145] *See* Clark v. Jenkins, 248 S.W.3d 418, 442 (Tex. App. 2008) (affirming a jury's finding that the defendant acted with actual malice).

[146] *See, e.g.*, Isle of Wight Cty. v. Nogiec, 704 S.E.2d 83, 90 (Va. 2011) ("[T]he circuit court properly submitted to the jury the issue of whether the [qualifiedly privileged] statements were made with malice.").

[147] *See* Stern v. Cosby,645 F. Supp. 2d 258, 275 (S.D.N.Y. 2009) ("Statements 1 and 2 are not defamatory per se merely because they impute homosexuality to Stern. They are, however, nonetheless susceptible to a defamatory meaning. Therefore, a jury will decide whether they are defamatory.); *but see* Damon v. Moore, 520 F.3d 98, 106-07 (1st Cir. 2008) (holding that a complaint was properly dismissed because no one could possibly have viewed the documentary as meaning that the plaintiff was disloyal to the United States).

3. "RIGHT-THINKING PERSONS" VERSUS "CONSIDERABLE AND RESPECTABLE CLASS"

The differences that result from the fact that the meaning of allegedly defamatory statements is ordinarily determined by judges in England, but by juries in the United States, is amplified because the countries differ in their articulation of the relevant frame of reference. In England, "[a] statement should be taken to be defamatory if it would tend to lower [the claimant] in the estimation of right-thinking members of society generally, or be likely to affect a person adversely in the estimation of reasonable people generally."[148] In contrast, in the United States, a plaintiff may recover for a harm caused by a statement that would be regarded as defamatory by a "considerable and respectable class of the community to which the statement was addressed."[149] Thus, in America, it is not necessary to show that right-thinking persons would have thought less of the plaintiff because of the utterance. For example, in a case based on a statement that implied that the plaintiff was a

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[148] Skuse v. Granada Television, [1996] EMLR 278, at 286.

[149] Damon v. Moore, 520 F.3d 98, 104 (1st Cir. 2008).

communist sympathizer, Judge Learned Hand, an eminent twentieth-century American jurist,[150] wrote:

> A man may value his reputation even among those who do not embrace the prevailing moral standards; and it would seem that the jury should be allowed to appraise how far he should be indemnified for the disesteem of such persons. That is the usual rule. . . . We do not believe, therefore, that we need say whether 'right-thinking' people would harbor similar feelings toward a lawyer, because he had been an agent for the Communist Party, or was a sympathizer with its aims and means. It is enough if there be some, as there certainly are, who would feel so, even though they would be 'wrong-thinking' people if they did. . . .[151]

G. REMEDIES

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[150] *See* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1994) ("Learned Hand is numbered among a small group of truly great American judges of the twentieth century.").

[151] Grant v. Reader's Digest Ass'n, Inc., 151 F.2d 733, 734-35 (2d Cir. 1945).

1. DAMAGES

Under common law principles, damages are routinely awarded to successful defamation plaintiffs as compensation for their losses. In many cases, in England[152] and the United States,[153] plaintiffs are obliged to prove their entitlement to those amounts with reasonable certainty by producing evidence to quantify the harm they have suffered. However, in other cases, the relevant legal principles permit the recovery of presumed damages. The presumption of damage is justified on the ground that it is normally difficult for a plaintiff to trace just what harm has occurred as the result of the circulation of defamatory charges, even though, at least in certain circumstances, such harm is probable.[154]

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[152] GATLEY ON LIBEL AND SLANDER, *supra* at 1259 ("In cases of slander not actionable per se . . . the claimant must prove that he has suffered special damage.).

[153] *See* Gertz v. Robert Welch, Inc., 94 S. Ct. 2997, 3012 (1974) (holding that a private defamation plaintiff who establishes liability under a less demanding standard than actual malice "may recover only such damages as are sufficient to compensate him for actual injury.").

[154] *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760 (1985) ("The rationale of the common-law rules [on presumed damages] has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the

England and the United States differ in defining the range of cases in which presumed damages may be awarded. Thus, while both countries allow recovery of such damages in libel cases[155] and in slander cases involving false allegations of serious criminal conduct[156] or incompetence in business, trade, or profession,[157] only the United States[158]

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character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact.'") (citing W. PROSSER, LAW OF TORTS § 112, p. 765 (4th ed. 1971)).

[155] *See* GATLEY ON LIBEL AND SLANDER, *supra* note 79, at 102 ("libel is always actionable per se"); RESTATEMENT (SECOND) OF TORTS § 569 (Am. Law Inst. 1977) ("One who falsely publishes . . . libel is subject to liability to the other although no special harm results from the publication.").

[156] *See* GATLEY ON LIBEL AND SLANDER, *supra* note 79, at 103 (applying the rule to crimes "for which the claimant can be made to suffer physically by way of punishment"); RESTATEMENT (SECOND) OF TORTS § 571 (Am. Law Inst. 1977) (limiting the rule to offenses "(a) punishable by imprisonment in a state or federal institution, or (b) regarded by public opinion as involving moral turpitude.").

[157] *See* GATLEY ON LIBEL AND SLANDER, *supra* note 79, at 103 (applying the rule to words "calculated to disparage the claimant in any office, profession, calling, trade or business held or carried on by him at the time of publication"); RESTATEMENT (SECOND) OF TORTS § 573 (Am. Law Inst. 1977) (limiting the rule to "slander that ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade or profession, or of his public or private office, whether honorary or for profit.").

currently permits awards of presumed damages in slander actions involving serious sexual misconduct or allegations of a loathsome disease.

More importantly, England and the United States differ as to whether the availability of presumed damages is linked to culpability requirements. In a wide range of cases, involving matters of public concern, American law conditions the plaintiff's entitlement to presumed damages on proof of actual malice.[159] In contrast, in England, the presumed damages rule is coupled with the rules, previously noted, holding that falsity is presumed and that the plaintiff need not prove that the defendant was at fault with respect to the falsity of the statement.[160] The result of

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[158] *See* RESTATEMENT (SECOND) OF TORTS § 572 (Am. Law Inst. 1977) (applying the rule to "slander that imputes to another an existing venereal disease or other loathsome and communicable disease"); *id.* § 574 (applying the rule to "slander that imputes serious sexual misconduct").

[159] *But see* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985) (holding that "recovery of presumed . . . damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern").

[160] *See* Part III-B.

this linkage can be breathtaking. Thus, one text describes defamation, under English law, as "the oddest" of the torts, explaining that:

> [The plaintiff] can get damages (swingeing[161] damages!) for a statement made to other without showing that the statement was untrue, without showing that the statement did him the slightest harm, and without showing that the defendant was in any way wrong to make it (much less that the defendant owed him any duty of any kind).[162]

Compensatory damages awards in tort cases are generally higher in America than in England. In the United States, jury awards in libel actions may top a million

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[161] *See* Swingeing, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/swingeing ("swingeing" means "very large, high, or severe").

[162] Reynolds v. Times Newspapers Ltd, [2001] 2 AC 127 (HL) 134 (quoting WEIR, A CASEBOOK ON TORT 525 (8th ed., 1996)).

dollars,[163] and courts have approved awards of presumed damages running into the millions.[164]

Punitive damages are available in defamation cases in both England and the United States. In each country, a complex body of law has developed to guide the inquiry into whether and in what amount punitive damages should be imposed.[165] In England, provisions in the Crime and Courts Act 2013, which are applicable to certain media defendants, provide that punitive damages generally may

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[163] MARC A. FRANKLIN & DAVID A. ANDERSON, CASES AND MATERIALS ON MASS MEDIA LAW 339-40 (5th ed. 1995) (the average jury award is $1.5 million).

[164] *See* WJLA-TV v. Levin, 564 S.E.2d 383, 391 (Va. 2002) (involving a $2 million award of presumed damages in a case where the defamatory statement involved alleged sexual assault); *see also* Young v. Gannett Satellite Info. Network, Inc., 734 F.3d 544 (6th Cir. 2013) (upholding an award of $100,000 to a police officer who was alleged to have had sex with a woman while on the job).

[165] *See* Neill, *supra* note 7, at 277-78 (summarizing present English law); *see also* Vincent R. Johnson, *Punitive Damages, Chinese Tort Law, and the American Experience*, 9 FRONTIERS OF LAW IN CHINA 321, 334-58 (2014) (discussing state and federal restrictions on punitive damages in the United States).

not be awarded against a "relevant publisher" that is a member of an "approved regulator."[166]

2. Adjudication of Falsity, Apologies, Corrections

Under section 8 of Defamation Act 1996, English courts have the power to "give judgment for the plaintiff and grant him summary relief . . . if it appears to the court that there is no defence to the claim which has a realistic prospect of success, and there is no other reason why the claim should be tried."[167] Elaborating on the court's power, section 9 of the 1996 Act states:

> (1) . . . "[S]ummary relief" means such of the following as may be appropriate—
>
> (a) a declaration that the statement was false and defamatory of the plaintiff;
>
> (b) an order that the defendant publish or cause to be published a suitable correction and apology;

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[166] Crime and Courts Act 2013, c. 22, §§ 34-42 (U.K.).

[167] Defamation Act 1996, c. 31, § 8 (U.K.).

> (c) damages not exceeding £10,000 or such other amount as may be prescribed by order of the Lord Chancellor;
>
> (d) an order restraining the defendant from publishing or further publishing the matter complained of.
>
> (2) The content of any correction and apology, and the time, manner, form and place of publication, shall be for the parties to agree. If they cannot agree on the content, the court may direct the defendant to publish or cause to be published a summary of the court's judgment agreed by the parties or settled by the court in accordance with rules of court. If they cannot agree on the time, manner, form or place of publication, the court may direct the defendant to take such reasonable and practicable steps as the court considers appropriate.[168]

To the distress of many American plaintiffs, there is nothing like these provisions in the United States. First, there is no easy route to a declaration that a defendant's statement about the plaintiff was false and defamatory. As

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[168] Defamation Act 1996, c. 31, § 9 (U.K.).

noted earlier,[169] under American law, the falsity of a defamatory statement is not presumed. Moreover, the plaintiff—not the defendant—normally has the burden of proving both that the utterance was false and that the defendant acted with the requisite degree of fault as falsity.[170] Many cases founder on that latter requirement, particularly if the plaintiff is required to prove actual malice.[171] In such instances, there is no reason for the court to rule on the question of falsity, which is often disputed. Except when a plaintiff ultimately prevails in a libel or slander action, American litigation rarely produces a clear statement about the truth or falsity of a defamatory statement. Even then, other than in judicial opinions—which are rarely read by members of the public—American courts do not issue declarations about truth or falsity.

Second, corrections and apologies are not used as sanctions in American defamation law. Although the idea of compelled retraction has sometimes been advanced by scholars, courts do not mandate retraction, even if the defendant is found to have committed slander or libel. It is

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[169] *See supra* Section III.B.1.

[170] *See supra* Section III.B.3.

[171] *See supra* Section III.B.4.

thought that a forced retraction would lack the sincerity that is essential to vindication of the defamed individual.[172]

The small role that apologies and corrections play in American law generally relates to damages,[173] rather than more creative sanctions. For example, under the Texas Defamation Mitigation Act, "(a) A person may maintain an action for defamation only if: (1) the person has made a timely and sufficient request for a correction, clarification, or retraction from the defendant [or the defendant has made such a statement]." [174] In addition, "[i]f a correction, clarification, or retraction is made . . . [by the defendant], a person may not recover exemplary damages unless the publication was made with actual malice." [175] The latter provision is almost meaningless because under American constitutional principles, a defamation plaintiff must prove

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[172] *See* Kramer v. Thompson, 947 F.2d 666, 680 (3d Cir. 1991) (quoting Leflar, *Legal Remedies for Defamation*, 6 ARK. L. REV. & B. ASS'N J. 423, 440 (1952)).

[173] *See* Robyn Carroll, Christopher To, & Marc Unger, *Apology Legislation and Its Implications for International Dispute Resolution*, 9 DISP. RESOL. INT'L 115, 134 (2015) (noting "the longstanding relevance of apologies to the assessment of damages in defamation" litigation).

[174] TEX. CIV. PRAC. & REM CODE § 73.055 (West 2015).

[175] *Id.* at § 73.059.

actual malice in order to recover exemplary damages, except in cases involving matters of purely private concern.[176]

Scholars complain that, despite recent reforms, English law fails to avail itself of the opportunity that new technology offers for embracing "the discursive remedies of apology, correction, and right of reply." [177] However, American law is far more reluctant to consider such possibilities.

3. INJUNCTIVE RELIEF

There are substantial differences in the ability and willingness of English and American courts to award permanent and temporary injunctive relief in libel cases. Under English law, courts have the power to order removal, or cessation of distribution, of a statement that has been adjudicated to be defamatory.[178] In addition, section 13 of Defamation Act 2013 provides that:

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[176] *See supra* Section III.G.1.

[177] Mullis & Scott, *supra* note 18, at 88; *see also id.* at 108 ("What most libel claimants want is a swift correction or right of reply. . . . [A] general right of reply and/or correction . . . exists in many jurisdictions around the world.").

[178] GATLEY ON LIBEL AND SLANDER, *supra* at 376-77.

> Where a court gives judgment for the claimant in an action for defamation the court may order—(a) the operator of a website on which the defamatory statement is posted to remove the statement, or (b) any person who was not the author, editor or publisher of the defamatory statement to stop distributing, selling or exhibiting material containing the statement.[179]

These provisions enable an English court to grant injunctive relief not only against a defendant, but also against a nonparty.[180] In a world dominated by Internet publications, section 13 offers important remedies because a prime objective of many plaintiffs is to have defamatory statements removed from websites.[181]

In contrast, in American courts, the general rule is that injunctive relief relating to libelous statements is not

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[179] Defamation Act 2013, c. 26, § 13 (U.K.).

[180] *See* Neill, *supra* note 7, at 8 ("These new powers enable the court to make an order against someone who, although not party to the litigation in which the claimant has established his entitlement to relief, is in a position to stop further publication of the defamatory statement.").

[181] *See id.* ("[I]t is a pressing concern for many claimants to . . . secure the removal of defamatory material from the internet.").

available.[182] Moreover, under Rule 65 of the Federal Rules of Civil Procedure, even in the rare case where an injunction is issued, the order "binds only the following who receive actual notice of it by personal service or otherwise: (A) the parties; (B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with anyone described in . . . (A) or (B)."[183] As such, websites typically cannot be enjoined to remove postings even after the postings have been held to be defamatory.

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[182] *See* Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339, 350 (Cal. 2007) ("[T]he general rule that a defamation may not be enjoined does not apply in a circumstance such as that in the present case in which an injunction is issued to prevent a defendant from repeating statements that have been judicially determined to be defamatory."); *see also* Graboff v. Am. Ass'n of Orthopedic Surgeons, 559 F. App'x 191, 194-95 (3d Cir. 2014) (affirming, on res judicata grounds related to the single publication rule, the denial of request to order removal from a website of statements which been found to be defamatory).

[183] FED. R. CIV. P. 65(d)(2); *see also* State of Ill. by Illinois Dep't of Pub. Aid v. U.S. Dep't of Health & Human Servs., 772 F.2d 329, 332 (7th Cir. 1985) (quoting Regal Knitwear Co. v. N.L.R.B., 324 U.S. 9, 14 (1945)) ("The purpose of the rule is to ensure 'that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.'").

For example, in Blockowicz v. Williams,[184] the United States Court of Appeals held that a libel plaintiff could not compel a website host to remove defamatory material from the website pursuant to a permanent injunction issued in an action to which the website was not a party. The court found that the plaintiff "presented no evidence that . . . [the website host or its manager] took any action to aid or abet the defendants in violating the injunction after it was issued, either by enforcing the Terms of Service or in any other way."[185]

In rare cases, in the United States, the losing defendant in a defamation action can be enjoined from repeating the same defamatory statement. However, the requirements are strict. "[T]he modern rule [is] that defamatory speech may be enjoined only after the trial court's final determination by a preponderance of the evidence that the speech at issue is false, and only then upon the condition that the injunction be narrowly tailored to limit the prohibited speech to that which has been judicially determined to be false."[186] Some courts hold that it is

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[184] 630 F.3d 563, 568 (7th Cir. 2010).

[185] *Id.*

[186] Hill v. Petrotech Res. Corp., 325 S.W.3d 302, 309 (Ky. 2010) (adopting the "modern rule"); *but see* Mortgage Specialists, Inc. v. Implode-Explode Heavy Indus., Inc., 999 A.2d 184 (N.H. 2010) (holding that an injunction

essentially impossible to narrowly tailor such injunctive relief. For example, in Kinney v. Barnes,[187] the Texas Supreme Court held that "while a permanent injunction requiring the removal of posted speech that has been adjudicated defamatory is not a prior restraint, an injunction prohibiting future speech based on that adjudication impermissibly threatens to sweep protected speech into its prohibition" and is therefore unconstitutional.[188]

English courts have jurisdiction to temporarily enjoin the threatened publication (or further publication) of a defamatory statement described with reasonable specificity.[189] However, courts will refuse to grant such interim relief if the claimant has unreasonably delayed in making the request; if there are doubts about whether the statement is defamatory; or if the defendant provides a

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issued against a website operator regarding republication was impermissible prior restraint).

[187] 443 S.W.3d 87 (Tex. 2014).

[188] *Id.* at 101 (relying "Texans' free-speech rights under Article I, Section 8 of the Texas Constitution").

[189] Neil, *supra* note 7, at 283, 287 (points stated).

statement asserting that it will be able to prove that the alleged defamation is true or privileged.[190]

In contrast, in the United States, temporary injunctions against libel or slander are regarded as unconstitutional prior restraints on free speech. Such relief is almost never available.[191] Consequently, English law is more pro-plaintiff than American defamation law to the extent that injunctive remedies are issued in England.

IV. NOTABLE VARIATIONS

English and American defamation law differs in countless respects. A few of the more notable minor variations are discussed in the following sections. They relate to England's "serious harm" requirement for

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[190] *Id.* at 284-85 (same).

[191] *See* Metro. Opera Ass'n, Inc. v. Local 100, Hotel Emp.'s & Rest. Emp.'s Int'l Union, 239 F.3d 172, 178-79 (2d Cir. 2001) (noting that "the First Amendment strongly disfavors injunctions that impose a prior restraint on speech . . . [and] that a time-honored principle of libel law is that equity will not enjoin a libel"); Puello v. Crown Heights Shmira, Inc., No. CIV.A. 3:14-0959, 2014 WL 3115156, at *2 (M.D. Pa. July 7, 2014) ("Both Pennsylvania and New York ascribe to the majority rule that 'equity will not enjoin a libel.'").

defamation actions, and its privileges related to scientific and academic peer review and reports about foreign courts and governments.

A. SERIOUS HARM REQUIREMENT

Until recently, one of the chief criticisms of English defamation law was that "relatively trivial claims were sometimes allowed to progress to trial."[192] To address this perceived problem, Defamation Act 2013 expressly articulates a "serious harm" requirement. Section 1 of the Act provides that:

> (1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.
>
> (2) For the purposes of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss.[193]

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[192] Mullis & Scott, supra note 18, at 104.

[193] Defamation Act 2013, c. 26, § 1 (U.K.).

At this early date, the meaning and effect of section 1 is still "open to debate." Its ultimate impact may be "marginal,"[194] except perhaps at the preliminary stages of litigation where claimants will be compelled to muster their evidence to show how the harm they have suffered is serious.[195]

The new serious harm requirement does "not get rid of the common law presumed damages rule"[196] and does not significantly distinguish English defamation law from its American counterpart. Although American law does not expressly articulate a similar requirement in equally concise terms, the same objective is achieved in a variety of ways.

To begin with, in the United States, a libel or slander claim will be dismissed unless the statement about the plaintiff carries with it an element of disgrace.[197] It is

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[194] Mullis & Scott, *supra* note 18, at 106.

[195] *Id.*

[196] GATLEY ON LIBEL AND SLANDER, *supra*, at 104.

[197] *See* Means v. ABCABCO, Inc., 315 S.W.3d 209, 215 (Tex. App. 2010) (affirming a grant of summary judgment to the defendant in a defamation action because although the plaintiff's statement may have been insulting and offensive, it lacked the element of disgrace or wrongdoing necessary for slander); *see also* JOHNSON, *supra* note 39, at 172 ("It is essential that the allegedly defamatory statement carry with it

difficult to envision an American case where that threshold will be met if the contested statement is likely to cause only trivial harm. In addition, American courts sometimes dismiss claims by persons whose reputations are so bad that they are effectively "libel-proof."[198] This defense eliminates another small, but important, range of cases, where defamatory utterances are unlikely to cause serious harm. More importantly, the economics of defamation litigation in

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the sting of disgrace or discredit. Saying that a judge accepts bribes is defamatory; saying that the judge is overly-intellectual is not defamatory. An article calling a Democrat a Republican is not actionable, but one asserting that a Democrat is a member of Al-Qaeda can form the basis for a libel lawsuit.").

[198] *See* Davis v. The Tennesseean, 83 S.W.3d 125 (Tenn. Ct. App. 2002) (an inmate, who had been sentenced to 99 years in prison for aiding and abetting a murder, was libel-proof and could not sue over statements in an article that incorrectly reported that he was the one who shot the tavern owner during the course of a robbery); *see also* Lamb v. Rizzo, 242 F. Supp. 2d 1032 (D. Kan. 2003) (a prisoner serving three consecutive life terms for murder and kidnapping was libel-proof); *cf.* Jameel v. Dow Jones & Co Inc., [2005] Q.B. 946 ("We accept that in the rare case where a claimant brings an action for defamation in circumstances where his reputation has suffered no or minimal actual damage, this may constitute an interference with freedom of expression that is not necessary for the protection of the claimant's reputation. In such circumstances the appropriate remedy for the defendant may well be to . . . strike out the action as an abuse of process.").

the United States effectively screen out claims that are trivial. In the usual case, a defamation plaintiff is represented by a lawyer whose fee is contingent.[199] That lawyer is not going to invest time in the case unless the defamatory statement has caused or is likely to cause serious harm, because those factors are important to recovering a sizeable award and an adequate contingent fee.[200] Conversely, in the relatively rare cases where the plaintiff is charged an hourly fee, the billings to the client are likely to be sizeable because

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[199] *See* Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 189 (2008) ("Although only a tiny fraction of defamation lawsuits result in monetary damages, lawyers are still willing to represent defamation plaintiffs on a contingent-fee basis because the average verdict in a successful defamation lawsuit is often in the millions of dollars."); Developments in the Law: The Law of Media, *VI. Media Liability for Reporting Suspects' Identities: A Comparative Analysis*, 120 HARV. L. REV. 1043, 1045 (2007) ("many plaintiffs can afford to bring defamation lawsuits only if they can find attorneys willing to represent them for a contingent fee"); Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 872 (2000) (citing a 1987 study indicating that "73% of libel plaintiffs use a contingency fee arrangement.").

[200] *See* Vincent R. Johnson, *Tort Law in America at the Beginning of the 21st Century*, 1 RENMIN U. OF CHINA L. REV. 237, 244 (2000) ("The contingent fee arrangement provides not only a device for financing legal services, but a mechanism for screening the merits of potential claims.").

American defamation litigation is exceedingly complex.[201] That sobering reality discourages hourly fee-paying clients from pursuing minor claims, particularly against media defendants who are repeat players in defamation litigation, and likely to fight tenaciously to avoid creating precedent that is adverse to their long-term interests.

B. STATEMENTS IN SCIENTIFIC OR ACADEMIC JOURNALS

Concern in England about whether statements in scientific and academic journals too readily expose authors to liability for defamation led to the enactment of a new peer-review privilege.[202] Section 6 of Defamation Act 2013 now provides:

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[201] *Cf.* Vincent R. Johnson & Stephen C. Loomis, *Malpractice Liability Related to Foreign Outsourcing of Legal Services*, 2 ST. MARY'S J. LEGAL MAL. & ETHICS 262, 283 (2012) (discussing a case in California where work related to the defense of a libel suit was outsourced to India to minimize costs).

[202] *See* Mullis & Scott, *supra* note 18, at 87 (Defamation Act 2013 "is intended to allow scientists, online commentators, non-governmental organizations, and others to introduce facts, criticism, comment and condemnation into public discussions without undue fear that their contributions will result in legal repercussions.").

(1) The publication of a statement in a scientific or academic journal (whether published in electronic form or otherwise) is privileged if the following conditions are met.

(2) The first condition is that the statement relates to a scientific or academic matter.

(3) The second condition is that before the statement was published in the journal an independent review of the statement's scientific or academic merit was carried out by—

(a) the editor of the journal, and

(b) one or more persons with expertise in the scientific or academic matter concerned.

(4) Where the publication of a statement in a scientific or academic journal is privileged by virtue of subsection (1), the publication in the same journal of any assessment of the statement's scientific or academic merit is also privileged if—

(a) the assessment was written by one or more of the persons who carried out the independent review of the statement; and

(b) the assessment was written in the course of that review.

(5) Where the publication of a statement or assessment is privileged by virtue of this

> section, the publication of a fair and accurate copy of, extract from or summary of the statement or assessment is also privileged.
>
> (6) A publication is not privileged by virtue of this section if it is shown to be made with malice.
>
> (7) Nothing in this section is to be construed—
>
> (a) as protecting the publication of matter the publication of which is prohibited by law;
>
> (b) as limiting any privilege subsisting apart from this section.
>
> (8) The reference in subsection (3)(a) to "the editor of the journal" is to be read, in the case of a journal with more than one editor, as a reference to the editor or editors who were responsible for deciding to publish the statement concerned.[203]

Whether this privilege will prove useful is open to doubt. The privilege is hedged by strict requirements, such as there having been an "independent review of the statement's scientific or academic merit" before

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[203] Defamation Act 2013, c. 26, § 6 (U.K.).

publication.[204] In addition, the privilege is defeasible by proof of malice, and inapplicable to numerous forms of scientific and academic expression, such as the publication of books, statements to the media, presentations at conferences, and articles published in venues less formal than peer-reviewed journals.[205]

In the United States, there has been little concern about the authors of scientific or academic articles being exposed to damages based on libel. The occasional lawsuits that arise from scientific or academic contexts are normally resolved by reference to well established principles of defamation law.

For example, in Dilworth v. Dudley,[206] the United States Court of Appeals for the Seventh Circuit held that, on the facts before it, labeling a scholar a "crank" for having taken a "wrongheaded" position was a nonactionable statement of opinion. The court noted that hyperbole cannot form the predicate for a defamation suit under American

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[204] Defamation Act 2013, c. 26, § 6(3) (U.K.).

[205] *See* Mullis & Scott, *supra* note 18, at 99 (discussing the limits of the peer-review privilege); see also UK STAT. 2013 c. 26 § 7(9) (extending a qualified privilege to fair and accurate reports of scientific or academic conference proceedings).

[206] *See* 75 F.3d 307, 311 (7th Cir. 1996).

law.[207] It explained that, "[t]o call a person a crank is basically just a colorful and insulting way of expressing disagreement with his master idea, and it therefore belongs to the language of controversy rather than to the language of defamation."[208]

Similarly, in Catalanello v. Kramer,[209] a legal scholar's comments during a lecture about a pending employment discrimination case were treated as mere nonactionable statements of opinion. According to the United States District Court for the Southern District of New York, "[r]ead in context, these statements are properly viewed as . . . an academic's ruminations . . . and therefore are not actionable as defamation."[210]

Unlike other American jurisdictions, Illinois dismisses defamation actions based on statements that are capable of

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[207] *See id.* at 309 (citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 2 (1990) ("statements that cannot reasonably be interpreted as stating actual facts about an individual are protected")).

[208] *Id.* at 310.

[209] 18 F. Supp. 3d 504 (S.D.N.Y. 2014).

[210] *Id.* at 518.

an innocent construction.[211] The innocent construction rule has been used to resolve a suit between scholars. In Lott v. Levitt,[212] an economist sued an author and his publisher for defamation based on statements made in the best-selling book Freakonomics, which asserted that other scholars had been unable to replicate the results of the economist's crime study. The economist claimed that the statement implied that he had falsified his results. In affirming a dismissal of the plaintiff's claim, the Seventh Circuit wrote:

> Using an academic definition of "replicate," Lott maintains that the passage means that others repeated, to a tee, his technical analysis but were unable to duplicate his results, suggesting that he either faked his data or performed his analysis incompetently.
>
> But this technical reading is not the only reasonable interpretation of the passage. . . . [Freakonomics] takes into account the lay reader, breaking down technical terms into easily understandable, if imprecise, ideas. . . .

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[211] Under the Illinois "innocent construction rule," "words allegedly libelous that are capable of being read innocently must be so read and declared nonactionable as a matter of law." *See* John v. Tribune Co., 181 N.E.2d 105, 108 (Ill. 1962).

[212] 556 F.3d 564 (7th Cir. 2009).

> The book relies on anecdotal evidence and describes with only the broadest strokes the statistical methodologies used. In this context, it is reasonable to read "replicate" in more generic terms. That is, the sentence could mean that scholars tried to reach the same conclusion as Lott, using different models, data, and assumptions, but could not do so. This reading does not imply that Lott falsified his results or was incompetent; instead, it suggests only that scholars have disagreed with Lott's findings about the controversial relationship between guns and crime. . . .[213]

The fact that England's statutory peer-review privilege has no broadly applicable American counterpart is a minor variation in the law of the two countries. It is probably more important that both countries recognize protection for certain statements of opinion and the common law doctrine of qualified privilege. The latter is a particularly flexible repository of principles that may be useful in resolving disputes arising from scientific and academic contexts.

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[213] *Id.* at 569.

C. REPORTS ABOUT FOREIGN COURTS AND GOVERNMENTS

Section 7 of Defamation Act 2013 extends the reach of England's reporting privileges. According to section 7, the absolute privilege for reports of court proceedings applies to:

> (a) any court in the United Kingdom;
>
> (b) any court established under the law of a country or territory outside the United Kingdom;
>
> (c) any international court or tribunal established by the Security Council of the United Nations or by an international agreement;
>
> and in paragraphs (a) and (b) "court" includes any tribunal or body exercising the judicial power of the State."[214]

In addition:

> (1) A fair and accurate copy of, extract from or summary of a notice or other matter issued for the information of the public by or on behalf of—

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[214] Defamation Act 2013, c. 26, § 7 (U.K.).

> (a) a legislature or government anywhere in the world;
>
> (b) an authority anywhere in the world performing governmental functions;
>
> (c) an international organisation or international conference.
>
> (2) In this paragraph "governmental functions" includes police functions.[215]

Furthermore, a similar privilege extends to "fair and accurate report[s] of proceedings at a press conference held anywhere in the world for the discussion of a matter of public interest."[216]

These new provisions reflect Britain's traditionally broad global perspective. In contrast, the United States has yet to move so far in immunizing reporting from liability.

The American Restatement of Torts expressly limits the privilege for fair and accurate reports of official actions or proceedings to conduct "by any officer or agency of the government of the United States, or of any State or of any of

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[215] *Id.* at § 7 (4).

[216] *Id.* at § 7 (5).

its subdivisions"[217] In refusing to apply the privilege to the acts of foreign governments, the American courts have reasoned either that the judiciary is ill-equipped to assess the reliability of foreign actions or proceedings, or that, on the facts before them, such conduct lacked the indicia of reliability.

For example, in Lee v. Dong-A Ilbo,[218] the United States Court of Appeals for the Fourth Circuit refused to extend the reporter's privilege to an American news report about a South Korean government press release, stating that "[f]oreign governments, like nongovernmental sources of information, are not necessarily familiar, open, reliable, or accountable."[219] The court reasoned that applying "the privilege in a piecemeal fashion would be extremely difficult,"[220] placing the court in the untenable position of attempting to determine whether a foreign state exhibits the

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[217] RESTATEMENT (SECOND) OF TORTS § 611 cmt. d (AM. LAW INST. 1977) (emphasis added).

[218] 849 F.2d 876 (4th Cir. 1988).

[219] *Id.* at 879.

[220] *Id.*

"openness and reliability that warrant an extension of the privilege."[221]

Similarly, in OAO Alfa Bank v. Center for Public Integrity, [222] Russian businessmen sued reporters and a public interest organization based on defamatory statements linking the plaintiffs to organized crime and narcotics trafficking. A federal court in the District of Columbia held that the fair report privilege did not apply to reports about the actions of a foreign government. It noted that "even if the better course would be to assess the application of the privilege to a foreign state on a case-by-case basis, the defendants in this suit allege that Russia during this period was a corrupt system run by crony capitalists."[223] The court concluded that was "hardly the showing of 'openness and reliability' one would presumably look for in extending the privilege."[224]

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[221] *Id.*

[222] 387 F. Supp. 2d 20 (D.D.C. 2005).

[223] *Id.* at 42.

[224] *Id.*

V. CONCLUSION

Despite the United Kingdom's passage of Defamation Act 2013, it is still the case that American defamation law is far more protective of free speech and free press than English law. Consequently, under the American SPEECH Act, United States courts should continue to refuse to enforce English libel judgments.